(b) 70% of $1,156 as special damages together with interest thereon at 3% per annum from July 10, 1978 (date of accident) to the date of judgment and thereafter at 8% per annum.

Items (a) and (b) shall be paid to the estate of the deceased.

(c) 70% of $7,200 being the loss of dependency at the rate of $200 a month for the rounded off period of 3 years from the date of death of the deceased to the date of judgment together with interest thereon at 3% per annum from the date of service of the writ to date of judgment and thereafter at 8% per annum.

(d) 70% of $22,500 being the amount to cover the loss of dependency for a further period of 13 years with interest thereon at 8% per annum from the date of judgment.

The aggregate of items (c) and (d) shall be apportioned on the basis of 15% thereof to the said Leong Chim and 85% to the Public Trustee to be held in trust for the said Lee Goon Ming for his maintenance and until he attains the age of 18 years.

(e) The Defendants shall pay the Plaintiffs the costs of the action as taxed by the proper officer of the court.

Order accordingly.

Solicitors: *Balendran, Chong & Bodi; V.P. Nathan & Partners.*

PUBLIC PROSECUTOR v. TAN KEO HOCK

[O.Cr. J. (George J.) November 19, 1981]
[Raub – Criminal Trial No. 3 of 1981]

Criminal Law and Procedure – Charge of having control of ammunition – Statement of accused to police made after arrest – Whether admissible – Whether made in hearing of police officer not below rank of inspector – Information leading to discovery – Statement not proved – Evidence Act, 1950, s. 27 – Criminal Procedure Code (F.M.S. Cap. 6), s. 113.

Evidence – Information leading to discovery – Statement not proved – Whether admissible.

In this case the accused was charged with having under his control ammunition. The prosecution case was that the accused made a cautioned statement after his arrest. The statement was made in Hokkien to a Detective Corporal but there was present an ASP who could not speak Hokkien although he said he understood what was said in Hokkien. It was alleged that as a result of what the appellant said the police went to a rubber plantation where after digging at a number of places in the undergrowth near the accused's house a Milo tin containing the ammunition was found. The question was whether the evidence of the statement and of the discovery of the ammunition was admissible.

Held: (1) in this case it could not be said that the accused made a statement in the hearing of the ASP within the meaning of the phrase "in the hearing of" as used in Regulation 21(1)(a) of the Essential (Security Cases) Regulations 1975 and therefore whatever was stated by the accused to the detective corporal was not admissible;

(2) the actual words used by the accused in this case were not proved and therefore whatever was stated by the accused that led to the discovery of the ammunition was inadmissible;

(3) there was more than a reasonable doubt as to whether the accused had knowledge of where exactly the rounds of ammunition were and even of whether it was ammunition that he and the police party were looking for. As there was that doubt of even knowledge the question of control or possession of the ammunition did not arise;

(4) the prosecution had therefore failed to prove a *prima facie* case against the accused and the accused must be acquitted.

Cases referred to:

(1) *Tai Chai Keh* v. *Public Prosecutor* [1948-49] M.L.J. Supp. 105, 110.
(2) *Hira Gobar* v. *Emperor* A.I.R. 1919 Bom. 162.
(3) *Baghel Singh* v. *Emperor* A.I.R. 1929 Lah. 794.
(4) *Lim Ah Oh & Anor* v. *Rex.* [1950] M.L.J. 269, 270.
(5) *Tan Hung Song* v. *Rex.* [1951] M.L.J. 181, 182.
(6) *Pulukuri Kotayya* v. *King Emperor* L.R. 74 I.A. 65.
(7) *Public Prosecutor* v. *Er Ah Kiat* [1966] 1 M.L.J. 9, 11.
(8) *Emperor* v. *Chokhey* A.I.R. 1937 All. 497.

CRIMINAL TRIAL.

Ahmad Zaki bin Haji Hussin (Deputy Public Prosecutor) for the prosecution.

Karam Singh for the accused.

Cur. Adv. Vult.

George J.: The Charge against the accused, TAN KEO HOCK, was as follows:–

"that you on the December 29, 1976 at about 6.10 p.m. at Batu 3 Jalan Lipis/Raub in the District Raub, in the state of Pahang, in a security area as proclaimed by the Yang Di Pertuan Agong vide proclamation No. PU(A) 148 dated May 15 1969, did have under your control 38 rounds of 7.65 m.m. ammunitions without lawful authority and that you have thereby committed an offence punishable under section 57(1)(b) of the Internal Security Act, 1960 (Revised 1972)."

The accused resided with his family in one or more rooms adjoining a smoke house off the main road at or about the 3rd mile Raub/Kuala Lipis Road. The smoke house and the adjoining dwelling house were situated in an unkempt rubber plantation. There was undergrowth among the rubber trees. The photographs P3A&B give some idea of the extent of the state of the undergrowth. The rubber plantation and the aforesaid buildings were not fenced in. No evidence was led as to the ownership of the plantation or of the smoke house.

Sometime in the early afternoon of December 29, 1976 PW1 ASP Lee Wai Hong arrested the accused at or about the 2nd mile Raub/Kuala Lipis Road. He was subjected to a lengthy interrogation by a Detective Corporal Tan Sin Peng (PW5) and one Detective Constable Ku Hamdan. PW1, ASP Lee was also present from time to time while the accused was being interrogated but perhaps because he did not speak the Hokkien dialect (in which the interrogation was conducted) did not involve himself in the interrogation. His evidence was that he was an observer of the interrogation.

In the course of the investigation the accused appeared to have given information that one Tee Teow Chuan had possession or control or had knowledge of the whereabouts of some ammunition. Tee Teow Chuan was promptly arrested and interrogated and then both the accused and Tee Teow Chuan were brought to the same room and interrogated together which the Court of Appeal (as it then was) had stated is a highly undesirable practice especially if an attempt is made to play one off against the other (See *Tan Chai Keh* v. *Public Prosecutor*[1]) This was exactly what

was done and the evidence of PW1, ASP Lee was, "When both arrested persons found themselves confronting each other the accused finally admitted to us that the ammo (ammunition) was hidden behind the smoke house."

ASP Lee went on to testify, "During the interrogation the accused told all sorts of stories, that it was in the possession of Tee Teow Chuan . . . . . I cannot remember the rest. Finally he admitted that he knew where the ammo was and agreed to lead us to where it was. I did not hear the accused give the history of the ammunition. I understand that by history is meant how he came to be in possession."

ASP Lee also testified that he was paying full attention to the interrogation when "he (the accused) finally admitted that he could lead us to the recovery of the ammo."

As ASP Lee gave his evidence I had the distinct impression that he was careful not to use words that would suggest that the accused had admitted to no more than the accused having knowledge of the existence of the ammunition in the vicinity of the smoke house. He appeared to avoid suggesting that the accused had admitted having control or possession of the ammunition. It was only towards the end of his testimony and when he was to some extent taunted by Counsel for the defence that ASP Lee said, "Yes he finally admitted he knew where *he had hidden* the ammo and will lead us there."

PW5 Tan Sin Peng who had interrogated the accused in his testimony did not say exactly what the accused had said. He testified, "As a result of the interrogation, one Tee Teow Chuan was arrested. He was arrested by a police party led by PW1. After Tee was arrested further interrogation was carried out and Tee was brought to confront the accused. As a result of the confrontation we took accused to the smoke house at Batu 3. We were led by PW2. We went to the smoke house to get the ammunition that had been kept there by the accused. The accused on his own accord said that he had kept the ammunition behind his house. He told me of this during the interrogation after Tee Teow Chuan had been arrested and after the confrontation between accused and Tee."

As a result of what was learnt in the course of the interrogation the accused was taken to the smoke house. He then pointed to different places behind the smoke house. The police party searched the area pointed out, even digging into the ground. According to ASP Lee they dug the ground in 7 or 8 places. Eventually the accused again pointed to yet another area and Insp. Badaruddin who was in charge of the police party searched that area and discovered a medium-sized milo tin tied hanging from the trunk of a small tree. In this were 38 rounds of live 7.65 mm. bullets.

The accused is charged with having control of these bullets on December 29, 1976.

The question that arises is whether the statements alleged to have been made by the accused in the course of his interrogation are admissible. On the face of it the alleged statement by the accused tantamounts to a confession made by a person after his arrest to a police officer in the course of police investigation.

Under the old section 113(1) of the Criminal Procedure Code no statement made by a person to a police officer in the course of a police investigation shall be used as evidence against that person other than for purposes of impeachment of credit. Section 25 of the Evidence Act provides that no confession made to a police officer below the rank of inspector made by a person accused of any offence shall be proved as against that person. Section 26 provides that no confession made by a person whilst in police custody shall be proved as against him unless it was made to a President of the Sessions Court or to a Magistrate.

Section 113 of the Criminal Procedure Code was amended to be *in pari materia* with Section 75 of the Internal Security Act both of which sections continued to emphasise that if the statement was made to a police officer after the arrest of the person, to be admissible in proceedings against that person, the statement has to be made to an officer of or above the rank of inspector.

Regulation 21 of the Essential Security Cases (Amendment) Regulations 1975 which has to be read with section 75 continues to retain this difference between statements made to a police officer not below the rank of an inspector and other police officers.

In the instant case the prosecution's contention that the alleged statement made by the accused to PW5 is admissible turns on whether it was made in the hearing of PW1 who was a police officer not below the rank of inspector, PW5 being below the rank of inspector. To my mind the import of the phrase "in the hearing of" is that not only did the officer hear what was said but understood what was said and as a result of which could vouch for what was said.

The evidence is that the interrogation of the accused was in the Hokkien dialect as well as in Mandarin. ASP Lee's Hokkien was so inadequate that he had to use PW5, a Detective Corporal to conduct the interrogation. ASP Lee said that although he could not speak in Hokkien he understood what was said in Hokkien. During the interrogation ASP Lee did not talk to the accused and the accused did not talk to him. In the course of the interrogation when ASP Lee wanted clarification he communicated with the accused through PW5.

Clearly ASP. Lee could not be relied upon to vouch for what was stated by the accused in the course of the interrogation. At best he got the gist of what the accused was saying. Accordingly, in my view, it cannot be said that the accused made a statement in the hearing of ASP Lee within the meaning of the phrase "in the hearing of" as used in Regulation 21 (1)(a). In the event I concluded that whatever it was that was stated by the accused to PW5, the corporal, was inadmissible.

But that is not the end of the matter. The court has to consider section 27(1) of the Evidence Act.

"27. (1) When any fact is deposed to as discovered in consequence of information received from a person accused of any offence in the custody of a police officer, so much of that information, whether the information amounts to a confession or not, as relates distinctly to the fact thereby discovered may be proved."

In *Tai Chak Keh* v. *Public Prosecutor (Supra)* Spenser Wilkinson J., in delivering the judgment of the Court of Appeal said, "There is less authority, however, upon the question of the discovery of an object with the assistance of the accused without evidence having been given of the infor-

mation which caused that discovery to be made (see however *Woodroffe & Ameer Ali's* Law of Evidence, 9th Ed. p. 158; *Hira Gobar* v. *Emperor*[2] *Baghel Singh* v. *Emperor*[3]. It does not appear to be sufficiently appreciated that evidence to the effect that an accused person has pointed out an object to the police, if it is admissible at all, is really of little value and is often prejudicial to the accused unless the information which led to the discovery is disclosed at the same time. The evidence in the present case that the appellant pointed out the tree in which the revolver was hidden, could clearly be of no value unless and until it became known what had caused the accused to lead the police there. That evidence by itself might indicate that the accused desired to confess his guilt by showing to the police a firearm he had in his possession; but it might equally indicate that the accused intended to indicate somebody else's guilt. For these reasons we are of opinion that evidence that an accused person has pointed out objects or places to the police should always be received with great caution, especially in any case which is tried with the aid of Assessors."

In *Lim Ah Oh & Anor* v. *Rex*[4] in the judgment of the Singapore Court of Appeal, Murray-Aynsley, C.J. said at page 270, "Section 27 (of the Evidence Ordinance) in certain cases permits evidence of what an accused person said, by way of exception to section 124 of the Criminal Procedure Code and of provisions relating to confessions. But evidence must be given of what the appellant said. Nothing justifies inviting the jury to guess what he said."

In *Tan Hung Song* v. *Rex*[5] the Singapore Court of Appeal said, "What is admissible under section 27 is so much of the information as distinctly relates to the fact discovered. In the present case the point to be established under section 27 was that the body was found on information supplied by the appellant. The statement "I have stabbed my wife" went further than that and was inadmissible. We would refer to the Privy Council decision in *Pulukuri Kotayya* v. *King Emperor*[6] and to the following passage on page 77:

"Information supplied by a person in custody that 'I will produce a knife concealed in the roof of my house' does not lead to the discovery of a knife; knives were discovered many years ago. It leads to the discovery of the fact that a knife is concealed in the house of the informant to his knowledge, and if the knife is proved to have been used in the commission of the offence, the fact discovered is very relevant. But if to the statement the words be added 'with which I stabbed A', these words are inadmissible since they do not relate to the discovery of the knife in the house of the informant."

While we do not wish to lay down any hard and fast rule we think that as a general rule it would be safer first to give evidence of the discovery of the fact before giving evidence of the information which the accused supplied. And in this connection section 137 sub-section 2 of the Evidence Ordinance is material. Thus the examination-in-chief would proceed on these lines:–

'Q Did the accused speak to you?
A. Yes.
Q. As a result of what he said what did you do?
A. I took the accused to his house.
Q. What did you find?
A. I found this knife which was concealed in the roof."

Up to this point there has been no danger of admitting an inadmissible statement. The fact of the discovery of the knife has been established, and that it was discovered as a result of something which the accused said. But if section 27 is to be used, the next question must be directed to eliciting so much of the information supplied by the accused as distinctly relates to the discovery of the knife. And here the danger lies. It is at this point that the court must take step to guard against the danger. The court may think it right to make the witness write down the answer first. Or it may prefer to send the Jury out while the matter is discussed. The point is that it is the business of the court to be alert to the danger that the witness, in stating what the accused said, may give in evidence more than distinctly relates to the fact discovered. And by first laying a foundation of the evidence relating to the fact discovered, the Court is given time to put itself on guard."

However, in *Public Prosecutor* v. *Er Ah Kiat*[7] Raja Azlan Shah, J. (as he then was) referred with approval to *Emperor* v. *Chokhey*[8] as follows:–

"Counsel also submitted that the hand-grenade was found in a public place and accordingly the accused had no exclusive control over the place, hence the hand-grenade. In my view, if the hand-grenade was discovered in consequence of the statement it would be evidence of his control even though the hand-grenade is concealed in a public place because unless he had control he would not have concealed it there. In *Emperor* v. *Chokhey*, the accused had said: 'I have buried the gun at such and such a place', and the court held that the whole of his statement was admissible and the statement and the fact of the accused having taken the sub-inspector to the place indicated and having unearthed a gun established his possession of and control over the weapon. True enough the gun was recovered from the railway premises within the railway fencing, but the court held that the accused had taken the precaution of burying it, and although the place was accessible to the public and the path was running close by, no member of the public could have ordinarily got at the gun inasmuch as it was concealed from view, whereas the accused could have access to it at opportune moments, therefore in the eyes of the law he must be deemed to be in possession and control of the gun."

Now in the instant case the statement made by the accused was never proved. As far as possible the exact words used should be proved.

I have quoted from ASP Lee's testimony which in any event is unreliable vis-a-vis as to what accused said in the interrogation.

But PW5 said, "The accused on his own accord said that he had kept the ammo behind his house."

PW5's diary had been destroyed and he was relying on his memory of incidents that took place in December 1976. His other evidence shows that he had forgotten important aspects of the investigations.

The interrogation went on from about 12.30 p.m. to 6 p.m. and again well into the night. Many "stories" were told by accused – many lies according to ASP Lee.

In the circumstances, the impression I obtained is that PW5 was simply giving what he understood was the gist of the statements made by the accused and after weeding out what he thought were the lies.

Where the whole decision turns on whether the accused had said, "I know where the ammunition is hidden" or whether he had said "I know where I hid the ammunition" then the least the court should expect is that the actual words used by the accused are proved. This was never done.

In the event I came to the view that whatever was stated by the accused that led to the discovery of the ammunition was inadmissible.

What was then left of the case for the prosecution is that the police party recovered a Milo tin containing the ammunition hidden in the undergrowth near to the house where the accused resided with his wife and family.

It was not a case of the accused leading the police party straight to the place where the ammunition was hidden but one where on his directions a comprehensive search was made of what could be likely areas where the ammunition was hidden. The accused either pretended not to know where exactly the rounds of ammunition were or genuinely did not know where exactly they were hidden. There was more than a reasonable doubt as to whether the accused had knowledge of where exactly the rounds of ammunition were and even of whether it was ammunition that he and the police party were looking for. If there was that doubt or even knowledge the question of control or possession of the ammunition simply did not arise.

In the event I was of the view that the prosecution had failed to prove a *prima facie* case on the charge or of any other offence and accordingly acquitted and discharged the accused.

Accused acquitted and discharged

Solicitors: *Karam Singh Veeriah & Co.*

SYARIKAT PERKAPALAN TIMOR v. UNITED MALAYAN BANKING CORPORATION BHD.

[O.C.J. (Mohamed Azmi J.) November 20, 1981]
[Kuala Lumpur – Civil Suit No. 1631 of 1975]

Banking Law – Banker/customer relationship – Duty of bank to customer – Bank liable for debiting on forged cheques – Bills of Exchange Ordinance 1949, s. 24

Evidence – Expert witness – Forgery – Whether self-forgery – Evidence Act, 1950, s. 45.

Banking Law – Banking procedure – Application for and issue of new cheque books.

The plaintiff sued the defendant for money due and owing to the plaintiff as a result of wrongful debiting of the plaintiff's account by the defendant. Two of the defences were that the signatures on the disputed cheques were genuine and that alternatively if they were forged the plaintiff was estopped from alleging forgery. Both parties relied on the testimony of expert witnesses.

Held: (1) if the bank had issued a cheque book meant for the plaintiff firm to an unauthorised person, and the signatures on the cheques were forged to the detriment of the firm, then by virtue of section 24 of the Bills of Exchange Ordinance, 1949, the cheques were wholly inoperative and the bank must be held fully liable for debiting any sum from the firm's account, as it had no authority to make such debit on the authority of forged cheques;

(2) the plaintiff's expert's evidence that the signatures were forged was to be preferred to the defendants' expert's evidence;

(3) the cross-examination of the plaintiff's expert on self-forgery was irrelevant as it was not part of the defendants' pleadings that the sole proprietor of the plaintiff firm was guilty of self-forgery;

(4) even if it was part of the defence, self-forgery was not proved. While the defence expert had been instructed by the defence the court would not suggest he was partial but would nevertheless reject his evidence as self-forgery was admittedly very rare and certain documents had not been examined by the defence expert.

Cases referred to:–

(1) *Ooi Choon Lye* v *Lim Boon Kheng & Ors* F.C.C.A. No. 37/70; *unreported.*

(2) *Francis Hector* v *Emperor* A.I.R. 1937 Allah. 182.

(3) *Haji Mohamed Dom* v *Sakiman* [1956] M.L.J. 45.

CIVIL SUIT.

Lim Kean Chye (*K.S. Tan* with him) for the plaintiff.
Chin Yew Meng for the defendants.

Cur. Adv. Vult.

Mohamed Azmi J.: This is a claim brought by Syarikat Perkapalan Timor (suing as a firm) against its banker, the United Malayan Banking Corporation Berhad, in respect of five cheques totalling $248,103.97. From the pleadings, it is not in dispute that these cheques (Exhibits P.1 to P.5) were made payable to Syarikat Pun and had been debited by the bank against the plaintiff firm's account No. 2159 between July 4 and July 28, 1975. The firm alleges that the relevant cheque book containing these five disputed cheques bearing serial Nos. 213051 ($46,425.00), 213055 ($55,657.32), 213056 ($54,800.35), 213057 ($38,650.10) and 213062 ($52,571.20) was never in fact issued by the bank to the firm and, as such, the firm could not possibly have drawn the said cheques. Under paragraph 10 of the Statement of Claim, it is also pleaded that the plaintiff's signatures on the disputed cheques were forged by some unknown person. The defendant bank having no authority to pay the said cheques, the plaintiff firm now claims for a declaration that the bank is not entitled to debit the firm's account and that the sum of $248,103.97 is due and owing by the bank to the firm. In the Statement of Defence, the bank avers that the relevant cheque book was issued to the firm, and that the firm did knowingly draw the said cheques in favour of Syarikat Pun. It is further averred that the signatures appearing on the said cheques were authorised signatures of the firm and, as such, the firm's account was correctly debited.

From the pleadings and the evidence adduced, it seems to me that there are two main issues for determination. The first issue is whether the "13" series cheque book (hereinafter referred to as 'the relevant cheque book') containing the five disputed cheques was in fact issued to the plaintiff firm. If the answer is in the negative, then it is clear that the firm could not possibly have drawn the said cheques, and as the relationship between a banker and a customer is that of a debitor and a creditor, the bank is liable to the firm for the sums debited. If the answer is in the positive, the second issue is whether the plaintiff's signatures on the said cheques were forgeries. If the debited cheques were forged, then liability on the part of the defendant bank would depend on whether the firm is estopped in law from alleging that they were forgeries by virtue of section 24 Bills of Exchange Ordinance 1949 or, alternatively, it depends on whether the forgeries were caused by